BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION

vs.	§	Due Process Hearing: 02-52
	§	Thomas J. Martin, Jr.
	§	Administrative Law Judge
GRAINGER COUNTY SCHOOLS,	§	

FINAL ORDER

THIS MATTER comes before this Honorable Court upon a request for a due process hearing filed by the Petitioner. With jurisdiction and venue properly before this Court the hearing was conducted pursuant to the agreement of the parties in Knox County, Tennessee on Thursday, November 21, 2002. The Court addresses each of Petitioner's issues below.

Issue 1. The county failed to properly maintain the in-place Behavior Plan and did terminate the behavior plan over the objection of the parent. relying upon an intervening summer break as a basis to remove the plan.

HOLDING

Petitioner alleges that "the county failed to properly maintain the behavior plan and did terminate said plan over the objections of the parent." It is the school district's conduct that the Petitioner should be complaining about not the county. An IEP was developed for the 2002-2003 school year. School officials and others at the M-Team agreed that at least on a temporary basis there would not be a behavior plan for the current school year even though there was a behavior plan for the prior school year. School district witnesses testified with credibility that the child had matured and was not having behavior difficulties to the degree that he experienced last year. The school district has not acted improperly. In any event, an offer of judgment was made prior to the hearing, whereon the district agreed to provide a behavior plan. Although there is not proof sufficient to this Court that a behavior plan is necessary, the district and parent have apparently agreed that a behavior plan would be implemented. Therefore, this issue is moot.

Issue 2. The county has issued disciplinary action on the child in the form of "Pink slips" or

other forms of punishment, since the removal of the behavior plan and that such punishment is an improper denial of a free appropriate public education.

HOLDING

There is no proof that the issuance of "pink slips" or punishments for the child's minor misbehavior incidents have caused a denial of FAPE. The Petitioner has failed to carry the burden of proof.

Issue 3. Formal use by Mr. Bowman of the title "School Psychologist." This gross misrepresentation, of Mr. Bowman's title and position, is a serious breach of professional conduct standards, is potentially criminal conduct, and raises serious questions involving the conduct and results of the assessments performed by Mr. Bowman, in August and September of this year.

HOLDING

Mr. Bowman testified in this matter. His testimony was credible and the Court carefully reviewed his report relative to the student at issue. The report in question is complete, thorough, and relevant in all aspects. Mr. Bowman was an impressive expert witness. Petitioner's third issue has no merit and requires that no relief be granted.

Issue 4. The validity of the most recent testing is suspect because the student's actions during the testing appear to invalidate the test and it is inappropriate for the county to rely upon suspect evaluations that reflect statistically significant departure from expectation. (in this case a reduction in IQ by 17 points), the failure to appropriately evaluate the child is an improper denial of a free appropriate public education.

HOLDING

The Court is mystified as to the "student's actions" referred to by the Petitioner. The Court finds that the child was properly evaluated, the special education services are appropriate, and the child is receiving benefit from his educational experience in Grainger County. Petitioner's allegations are obviously misguided.

Issue 5. The county did rely upon a suspect evaluation to decertify the child as learning disabled when the same testing reflects that the child has not made any reasonable progress toward appropriate grade advancement, and that the failure to appropriately apply the available information is an improper denial of a free

appropriate public education.

HOLDING

The school district has properly used the available information and utilized same in order to formulate an appropriate IEP. It should be noted that the Petitioner failed to put on any expert testimony. Petitioner's argument as to the fifth issue is rejected.

Issue 6. The county does rely upon Cherokee Health Systems, a contractor , for support services. Cherokee is no longer is independent of the State of Tennessee but is now in a form of conservatorship that allows the State to direct Cherokee as necessary. Cherokee has developed contractual relationships with all local providers, with appropriate credentials and reputation for excellence, to preclude adverse evaluations. No local provider, with positive reputation. was found in the community who was not already under a year-to-year consulting contract with Cherokee, or the State.

HOLDING

The sixth issue is waived by Petitioner.

Issue 7. The county failed to provide Speech therapy in a manner consistent with previous IEP plans and that the documentation within the M-Team meeting minutes is suspect. The failure to accurately document the M-Team minutes is an improper denial of a free appropriate public education.

HOLDING

The school district speech therapist testified that the child received speech services pursuant to prior IEP and that the child no longer is eligible for services. No other competent proof was submitted. Therefore, this issue is also without merit.

Issue 8. That the child is in need of formal evaluations without the taint of Cherokee contract obligations, or without State of Tennessee contract obligations as an appropriate evaluation is necessary to obtain a free appropriate public education and that all local providers cite to contractual conflicts to decline testing. Therefore testing at county expense is appropriate, and that such testing be conducted by a nationally recognized professional in the areas of the child's need.

It is the understanding of this Court that the Petitioner is requesting an independent evaluation pursuant to IDEA.

20 U.S.C. 1415, in part;

(a) Establishment of Procedures- Any State educational agency, State agency, or local educational agency that receives assistance under this part shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

(b) Types of Procedures- The procedures required by this section shall include --

(1) an opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child:

34 C.F.R. § 300.502 Independent educational evaluation, in part

(a) General.

(1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency shall provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section.

(3) For the purposes of this part —

(i) Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and

(ii) Public expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with §300.301.

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—

(i) Initiate a hearing under §300.507 to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing under §300.507 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency initiates a hearing and the final decision is that the agency's evaluation is appropriate. the parent still has the right to an independent educational evaluation, but not at public expense.

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However. the explanation by the parent may not be required and the public agency may not unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the public evaluation.

(e) Agency criteria.

(1) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained. including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.

(2) Except for the criteria described in paragraph (e)(1) of this section, a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

(Authority: 20 U.S.C. 1415(b)(1))

Related Statute, Tenn. Code Ann. § 49-10-601, in part.

(e)(1) A parent or guardian who believes the diagnosis or evaluation of the child, as shown in the records made available to the parent or guardian pursuant to subsection (d), to be in error may request an independent examination and evaluation of the child and shall have the right to secure the same and to have the report thereof presented as evidence in the proceeding.

(2) If the parent or guardian is financially unable to afford an independent examination or

evaluation, it shall be provided at state expense.

HOLDING

Certainly, the authority cited above allows the Petitioner to obtain an independent evaluation at public expense, unless the school district initiates a hearing pursuant to statute. This due process hearing was conducted at the Petitioner's request. Although, this Court finds that the school district evaluation is appropriate, it does not do so for the purpose of denying an independent evaluation. It is the opinion of this Court that an independent evaluation at the school district's expense should be conducted unless the district initiates a hearing. An independent evaluation could be beneficial to the district and the student. At a minimum an independent evaluation would provide additional information about the student. Therefore, unless the school district initiates a hearing the Petitioner in entitled to an independent evaluation.

Issue 9. That the Speech evaluation is tainted because of the challenge by mother, of the speech therapy that was not previously provided, when the M-Team did agree that the child does stutter, and is an improper denial of a free appropriate public education. That the validity of the current evaluation is in question as the evaluation was conducted by the same Cherokee provider who it is claimed failed to properly provide the services previously identified as educationally necessary in previous IEPs.

HOLDING

This issue waived by Petitioner.

Issue 10. The county routinely drafts IEPs for use by the M-Team that are uniformly vague and are not objectively measurable to be able to ascertain progress. The county resists efforts to add objective criteria to their pre-developed plan.

HOLDING

Petitioner's allegations are unsubstantiated by any testimony. Only the statements of counsel, which do not rise to the level of proof, are before the Court. This issue is decided in favor of the school district.

Issue 11. The county failed to offer a full continuum of options for the M-Team to consider and has consistently referred to cost in the development of an IEP, rather than the needs of the child.

HOLDING

There was no testimony where cost was considered by the M-Team or mentioned by any of it's members in the development of goals and objectives. Petitioner has again failed to carry the burden of proof.

Issue 12. The county failed to maximize the effort to include the child in mainstream classes, and instead has him placed into a special class for students with disabilities.

HOLDING

This issue has been waived.

SUMMARY

The school district has not acted improperly relative to any issue raised by Petitioner. The only issue with any merit whatsoever is whether the Petitioner is entitled to an independent evaluation. For reasons set out above, it is the opinion of the Court that Petitioner is entitled to that relief even though the issue was brought to the district's attention at the courthouse steps just a few days before this hearing. It should be noted that Petitioner's case in chief provided very little, if anything, that led the Court to provide relief in the form of an independent evaluation. Therefore, the district is the prevailing party.

NOTICE

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee or the Chancery Court in the county in which the Petitioner resides or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty (60) days of the date of the entry of a Final Order. In appropriate cases, the reviewing court may order that this Final Order be stayed pending further hearing in the cause.

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court, under provisions of §49-10-601 of the Tennessee Code Annotated.

IT IS SO ORDERED.

ENTERED THIS THE 11th DAY OF DECEMBER 2002.

JUDGE THOMAS JAY MARTIN, JR.
ADMINISTRATIVE LAW JUDGE
CORDELL HULL BUILDING, SECOND FLOOR
113 West Main Street
Gallatin, TN 37066
(615) 452-1519
(615) 452-6203 (Fax)

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Final Order has been placed in the U.S. Mail postage pre-paid to Mr. Henry T. Ogle, Ogle & Ogle, 1518 Broadway Drive, Knoxville, TN 37917, [redacted], and Charles W. Cagle, Lewis, King, Krieg and Waldrop, 201 4th Avenue North, Ste. 1500, Nashville, TN 37219, on this the 11th day of **December 2002.**

JUDGE THOMAS JAY MARTIN